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**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

FINJAN, INC., a Delaware Corporation,

Plaintiff,

vs.

CISCO SYSTEMS, INC., a California  
Corporation

Defendant.

Case No. 5:17-cv-00072-BLF

**DEFENDANT CISCO SYSTEMS, INC.'S  
MOTION IN LIMINE NO. 1 TO EXCLUDE  
PHIL HARTSTEIN'S TESTIMONY  
REGARDING FINJAN'S CORPORATE  
HISTORY AS HEARSAY**

**REDACTED**

## TABLE OF ABBREVIATIONS

Plaintiff Finjan, Inc.	Finjan or Plaintiff
Defendant Cisco Systems, Inc.	Cisco or Defendant
Federal Rule of Evidence	FRE
February 25, 2019 deposition transcript of Philip Hartstein	Ex. 1
Finjan's List of Fact and Expert Witnesses	Ex. 2
December 11, 2018 trial transcript in the matter of <i>Finjan, Inc. v. Juniper Networks</i> , Case 3:17-cv-05659-WHA, Dkt. 336	Ex. 3
December 13, 2018 trial transcript in the matter of <i>Finjan, Inc. v. Juniper Networks</i> , Case 3:17-cv-05659-WHA, Dkt. 338	Ex. 4
August 6, 2019 deposition transcript of Shlomo Touboul	Ex. 5
August 5, 2019 deposition transcript of Asher Polani	Ex. 6
April 7, 2015 deposition transcript of John Vigouroux from the matter of <i>Finjan, Inc. v. Blue Coat Systems, Inc.</i> , No. 13-cv-03999	Ex. 7
LinkedIn profile of Gadi Maier	Ex. 20
April 10, 2019 deposition transcript of Daniel Chinn	Ex. 21
Email exchange between Jennifer Forte and Hannah Lee regarding email production requests	Ex. 22
Declaration of Nicole Grigg in Support of Defendant Cisco Systems, Inc.'s Motions in Limine	Grigg Decl. <sup>1</sup>

<sup>1</sup> Unless otherwise specified, all exhibits refer to those attached to the Grigg Decl.

1 Pursuant to FRE 602 and 801, Cisco moves to exclude testimony from Finjan's current  
2 President and CEO, Phil Hartstein, regarding Finjan's corporate history, including its interactions  
3 with Cisco, from prior to the time of his employment with Finjan. Mr. Hartstein lacks the personal  
4 knowledge required by FRE 602 and thus any such testimony would be inadmissible hearsay under  
5 FRE 801 and 802.

6 Mr. Hartstein joined Finjan in April 2013. Ex. 1, Hartstein Dep. Tr., at 59:20-23.  
7 Nevertheless, Finjan's trial witness list states that the subject matter of Mr. Hartstein's trial  
8 testimony will be "Finjan's business and interactions with Cisco." Ex. 2, Plaintiff's Witness List.  
9 Indeed, based on his testimony in prior trials, it appears that, absent objection, Finjan intends to  
10 have Mr. Hartstein testify as a "corporate historian" regarding Finjan's business dating back to its  
11 inception in 1995. Mr. Hartstein's past testimony includes characterizations of the development of  
12 Finjan's technology, the purported impact of Finjan's patents on the security industry, and Finjan's  
13 relationships with third parties prior to April 2013, all of which predate Mr. Hartstein's employment  
14 at Finjan. Mr. Hartstein has admitted that "by the time [he] arrived at Finjan, the business was  
15 already 16 or 17 years old," and his historical account is based purely on information learned from  
16 third parties. Ex. 3, *Finjan, Inc. v. Juniper Networks, Inc.*, No. 3:17-cv-05659 (N.D. Cal.), 12/11/18  
17 Trial Tr., at 248:12-249:2. Such testimony fits squarely within the definition of hearsay and the  
18 Court must exclude it because none of the hearsay exceptions apply. Indeed, during the *Finjan v.*  
19 *Juniper* trial, Judge Alsup confirmed that he would have excluded the Hartstein testimony had  
20 Juniper objected. Specifically, after Mr. Hartstein's testimony was completed without objection,  
21 Juniper later had a witness also give historian-type hearsay testimony in its case. Judge Alsup  
22 explained that the Juniper testimony was hearsay: "what he's been telling us is hearsay because he  
23 wasn't at the company at the time." Ex. 4., *Finjan, Inc. v. Juniper Networks, Inc.*, No. 3:17-cv-  
24 05659 (N.D. Cal.), 12/13/18 Trial Tr., at 709:3-4. Judge Alsup then explained that he would  
25 normally exclude the hearsay testimony, "except the other side did exactly the same thing.  
26 Whenever you [Finjan] brought your guy [Hartstein], he testified about the history of Finjan. And  
27 he hadn't been there either. No objection was made on either side. So they both are guilty of this."

1 Id. at 709:3-12. Cisco is thus making the hearsay objection now to avoid the introduction of  
2 hearsay evidence.

3 FRE 602 limits a witness's trial testimony to matters that are within the witness's personal  
4 knowledge. FRE 602 ("A witness may testify to a matter only if evidence is introduced sufficient  
5 to support a finding that the witness has personal knowledge of the matter."). Mr. Hartstein's role  
6 as the current CEO of Finjan is not an exception to the hearsay rules: "A corporate representative  
7 may not testify to matters outside his own personal knowledge to the extent that information is  
8 hearsay not falling within one of the authorized exceptions." *Union Pump Co. v. Centrifugal Tech.,*  
9 *Inc.*, 404 F. App'x 899, 907-08 (5<sup>th</sup> Cir. 2010) (internal citation omitted). Courts around the  
10 country exclude such evidence. *See, e.g., Sovereign Military Hospitaller v. Fla. Priory of Knights*  
11 *Hospitallers of Sovereign Order*, 702 F.3d 1279, 1295 (11th Cir. 2012) (holding the district court  
12 erred when it permitted a lay witness—the head of an organization—to testify at a bench trial about  
13 the organization's history where the witness had no personal knowledge of the historical facts to  
14 which he testified); *TIG Ins. Co. v. Tyco Int'l Ltd.*, 919 F. Supp. 2d 439, 454-55 (M.D. Pa. 2013)  
15 ("Although Rule 30(b)(6) allows a corporate representative to testify to matters within the  
16 corporation's knowledge during deposition, at trial the designee may not testify to matters outside  
17 his own knowledge to the extent that information is hearsay not falling within one of the authorized  
18 exceptions.") (internal citation omitted); *Stryker v. Ridgeway*, 2016 U.S. Dist. LEXIS 163131, at  
19 \*8-9 (W.D. Mich. Feb. 1, 2016) (finding that testimony based not on personal knowledge, but  
20 instead on hearsay, is inadmissible at trial, and collecting cases); *Indus. Eng'g & Dev. v. Static*  
21 *Control Components, Inc.*, 2014 U.S. Dist. LEXIS 141823, at \*8 (M.D. Fla. Oct. 6, 2014)  
22 (corporate representative may not testify at trial as to matters that are not within his personal  
23 knowledge and are hearsay").

24 Mr. Hartstein lacks personal knowledge related to Finjan's business operations prior to his  
25 employment in April 2013. Finjan was founded in 1995 by Shlomo Touboul. Ex. 5, Touboul Dep.  
26 Tr., at 29:6-12. Mr. Touboul served as Finjan's CEO until 2005. *Id.* at 176:20-25. Thereafter,  
27 management of Finjan's operations changed hands multiple times. From 2005 to 2009, Finjan had  
28

three different CEOs. Ex. 6, Polani Dep. Tr., at 15:10-13; Ex. 7, Vigouroux Dep. Tr., at 17:17-20; Ex. 20, Gadi LinkedIn profile. In 2009, Finjan sold its operations, products and technology to M86 Security. Ex. 21, Chinn Dep. Tr., at 60:17-61:6. In 2010, following the M86 transaction, Finjan's then-Director, Daniel Chinn, assumed the role of CEO until Mr. Hartstein joined Finjan in April 2013. *Id.* at 111:12 – 112:6.

The development of Finjan's patented technology predates Mr. Hartstein's employment by almost 20 years for some of the patents. Similarly, Mr. Hartstein was not an employee of Finjan when Cisco invested in Finjan in 2004, nor during the 2004-2010 time period when Cisco's board observer interacted with Finjan. Indeed, when asked if he had any firsthand knowledge related to alleged interactions between Finjan and Cisco during the time period from 2004-2009, Mr. Hartstein stated, "[REDACTED] Ex. 1 at 219:3-20.

Despite Mr. Hartstein's relatively recent tenure as Finjan's CEO, Finjan seeks to have Mr. Hartstein testify at trial as Finjan's "corporate historian" summarizing years of business operations, product history, technology background, litigation results, and licensing deals. But Mr. Hartstein's knowledge is not personal knowledge; it is based on nothing more than what he has allegedly learned from other people. For example, in the *Finjan v. Juniper* trial, Mr. Hartstein testified as follows:

To be able to represent Finjan and its corporate history, I had to basically become the corporate historian. So I met with and still have relationships with all the prior CEOs in the business, the prior chief technology officers. I had to read all of the corporate documentation, become aware of all the company's past dealings because really there is no other person in the company today who could answer those questions better than I could.

Ex. 3 at 248:20-249:2. By his own admission, Mr. Hartstein's testimony related to Finjan's corporate history is based on his conversations with Finjan's former employees and his alleged review of "corporate documentation" that predates his employment. Mr. Hartstein purports to use

1 the information relayed to him from third parties and derived from unidentified documents as  
2 evidence of “all of the company’s past dealings.” This is classic hearsay.

3 No hearsay exception applies to Mr. Hartstein’s testimony. Nor can Finjan satisfy the  
4 residual exception to hearsay in FRE 807. Rule 807(a) allows for hearsay testimony only if “(1) the  
5 statement is supported by sufficient guarantees of trustworthiness—after considering the totality of  
6 circumstances under which it was made and evidence, if any, corroborating the statement and (2) it  
7 is more probative on the point for which it is offered than any other evidence that the proponent can  
8 obtain through reasonable efforts.” Finjan does not meet either requirement. Rule 807(b) also  
9 requires a special notice procedure so that Cisco “has a fair opportunity to meet” the evidence.

10 Rule 807 is narrowly construed and used only in extraordinary circumstances. *See Fong v.*  
11 *Am. Airlines, Inc.*, 626 F.2d 759, 763 (9th Cir. 1980) (exception is “to be used rarely and in  
12 exceptional circumstances”). “Admitting [] run-of-the-mill hearsay undercuts the idea that the rule  
13 should be limited so it does not swallow the entirety of the hearsay rule.” *Draper v. Rosario*, 2014  
14 U.S. Dist. LEXIS 58225, at \*15 (E.D. Cal. Apr. 25, 2014). Thus, Rule 807 applies to testimony to  
15 establish a specific fact that is otherwise subject to the standards in the rule; it is not a catchall that  
16 could permit a historical narrative.

17 Likewise, Mr. Hartstein’s testimony is not “supported by sufficient guarantees of  
18 trustworthiness.” FRE 807(a)(1). Just the opposite. Mr. Hartstein’s prior testimony has proven to  
19 be false. In particular, in the *Juniper* case, Mr. Hartstein claimed that he “met with and still ha[s]  
20 relationships with all the prior CEOs in the business” (Ex. 3 at 248-249) and he “read all of  
21 [Finjan’s] corporate documentation.” Ex. 3 at 248:21-24. However, when he was deposed two  
22 months later in this case, Mr. Hartstein testified that [REDACTED]

23 [REDACTED] Ex. 1, at  
24 126:11-18. Mr. Hartstein further testified that [REDACTED]

25 [REDACTED] *Id.* at 350:8-23.  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

*Id.* at 147:5-19. Indeed, Cisco requested Finjan’s historical “corporate documentation” during discovery, including documents and emails generated by Finjan’s former CEOs, and was told repeatedly that those documents were not in Finjan’s possession. Ex. 22, Email exchange regarding ESI requests. Thus, the very basis for Mr. Hartstein’s historical testimony is not only hearsay, but is undermined and contradicted by Mr. Hartstein himself.

Moreover, Finjan cannot show that Mr. Hartstein’s testimony “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” FRE 807(a)(2). Finjan could have obtained any testimony it would be seeking from Mr. Hartstein by either calling the prior CEOs at trial (all of whom are alive and well) or deposing them and introducing their deposition testimony at trial. Indeed, three of these CEOs were deposed in this case (Messrs. Touboul, Polani, and Chinn), yet Finjan made no effort to obtain a “corporate history” from each of their respective tenures for use at trial. Rule 807 does not apply where the party “has the legal tools to obtain the evidence it believes it needs” but “has chosen to forego those tools ...” and “the trustworthiness of the statements is questionable [when] they are offered through an employee of the party who has an interest in the contents of the statements.” *Tele Atlas N.V. v. NAVTEQ Corp.*, 2008 U.S. LEXIS 111866, at \*16 (N.D. Cal. Oct. 28, 2008).

Accordingly, the Court should not permit Mr. Hartstein to testify about the history of Finjan, including Finjan’s interactions with Cisco that predate his April 2013 employment with Finjan.

Dated: April 16, 2020

Respectfully submitted,

/s/ Nicole E. Grigg

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